STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Borello, P.J., and Murray and Fort Hood, JJ.

SHARON BROOKS as Personal Representative
of the Estate of DOMINIQUE MIQUEL WADE,
Deceased,
Plaintiff-Appellee
v.

STARR COMMONWEALTH, a
Michigan non-profit corporation, and
Defendant/Cross-Defendant-Appellant
and

BRIDGEWAY SERVICES, LLC, a
Michigan corporation, jointly and severally,
Defendant/Cross-Plaintiff-Appellee.

Supreme Court Docket No: 139144
COA Docket Nos.: 277469
Oakland Circuit Court No.: 05-065114 NO
(Hon. John J. McDonald)

REPLY BRIEF ON APPEAL -- APPELLANT STARR COMMONWEALTH

CERTIFICATE OF SERVICE

ORAL ARGUMENT REQUESTED

Respectfully submitted:

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Dated: April 7, 2010

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1. **Response to Plaintiff-Appellee's Statement of Facts.**

Plaintiff-Appellee ("Plaintiff") has attempted to cloud the discreet legal questions before this Court by focusing on largely irrelevant facts regarding Kirksey's past (Plaintiff's Brief on Appeal ("Plaintiff's Brief"), pp 1-2). Plaintiff has also, not surprising, "cherry-picked" the facts in an effort to portray Kirksey in such a manner that it should have been clear to everyone that Kirksey's decision to murder Wade, who by all accounts was a complete stranger unknown to Kirksey, was simply a question of when the murder would take place, not a question of if it may take place. Indeed, a review of the very documents Plaintiff has supplied this Court as part of its Appendix establishes the flaw in this reasoning. In this regard, Starr notes that while the November, 1997 incident was certainly disturbing, it involved an altercation with another student – not someone that was a complete stranger (Appellee's Appendix, 1b). The November, 1999 incident Plaintiff addresses did not involve any weapon, but rather an assault by way of punching and kicking (*Id.* at 3b). Kirksey did not have a weapon on that occasion, and indeed, was later arrested with a toy gun, not a real gun (*Id.* at 4b).

While both of these incidents are serious criminal matters that required juvenile services to intervene in Kirksey's life, the juvenile court system did not find that Kirksey should be placed in high-level security due to concerns of fears for himself or others. Rather, Kirksey was placed in a medium security facility for less than two months before being placed in residential placement with his mother (*Id.* at 11b). In removing Kirksey to the residential setting, the Updated Community Treatment Plan dated July 26, 2000 "**indicated . . . that [Kirksey's] potential for violate conduct was 'not probable'**" (*Id.*). Similarly, while Kirksey did have a set back which caused him to be placed in both low security (Crossroads for Youth) and a medium security (Boys and Girls Republic), a Residential Risk Assessment completed in 2001 noted that Kirksey was "low risk" and his Release Plan from Boys and Girls Republic completed

in December, 2001 noted that Kirksey's "'potential for violent behavior is low'" (*Id.*). Indeed, after completing this program, Kirksey was again "de-escalated to the community" (*Id.*).

With regard to the March, 2002 incident, Plaintiff failed to note that the firearm in Kirksey's possession was a BB gun (*Id.* at 18b). Again, not to downplay Kirksey's actions, but the possession and threatened use of a BB gun simply does not put anyone on notice that it is foreseeable that Kirksey will murder someone if given the chance.

In short, while Kirksey was certainly a troubled youth that exhibited random acts of violence, it simply cannot be said that it was foreseeable that Kirksey would murder a complete stranger if given the opportunity. This is especially true given the fact that while Kirksey had a history of truancy both at Starr and at his previous placements, none of those previous truancies led to any criminal actions, and in one instance actually led to Kirksey turning himself in following the truancy (Appellee's Appendix, 11b-13b). At best, the documentation of Kirksey's previous history establishes questions as to the placement determinations made by Bridgeway and the juvenile system. Bridleway has been dismissed from this lawsuit, a decision that Plaintiff has chosen not to appeal. Starr is simply not responsible for any negligence or error that Bridgeway may have committed in this case.[1]

2. Response To Plaintiff's Argument.

A. Starr Appropriately Addressed Why MCL 803.306a(1) Creates No Duty.

Plaintiff first argues that Starr fails to address whether §306a creates a duty, but instead "reintroduces the (already dismissed) common law duty theories in an attempt to undermine sole duty theory in this case," claiming that Starr's "reliance on [the mulit-faceted duty test] is

[1] Starr also notes that while Bridgeway noted Kirksey's unsafe conduct, the conduct was still considered as "attention seeking" behavior by Bridgeway, and largely focused on injury to Kirksey himself as opposed to others (*Id.* at 13b; Appellant's Appendix, 84a). Regardless, it is undisputed that despite Kirksey's behavior, Starr lacked any contractual basis to remove Kirksey from its program, as that decision was solely Bridgeway's (Appellant's Appendix, 55a-56a).

completely misplaced" (Plaintiff's Brief, pp 10 n 3, 13). Nothing could be further from the truth.

The duty test Starr relies on is the test set forth by this Court in numerous cases, including *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 69 NW2d 689 (2004) and *Buczkowski v McKay*, 441 Mich 96, 101 n. 4; 490 NW2d 330 (1992). That test was also applied by the trial court in determining that Starr owed no duty to Wade under §306a (Trial Court Opinion, 16a-17a, *citing Graves v Warner Bros*, 253 Mich App 486, 492-93 (2002)). This duty test was also relied on by the Court of Appeals in *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1; 596 NW2d 620 (1999), a case where the Court of Appeals decided whether a violation of environmental laws "impose[d] a duty of care, actionable in tort, toward the general public" (Court of Appeals Opinion, 22a, *citing Cipri, supra* at 16-17). As the Court of Appeals in the instant case noted, "**once a duty is found**, the violation of the statute *may* demonstrate prima facie evidence of negligence" (*Id.* at 22a, *citing Cipri, supra* at 16). The test used by *Cipri* is as follows:

> "In determining whether a duty exists, courts look to different variables, including the (1) foreseeability[2] of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach." [*Terry v Detroit,* 226 Mich App 418, 424; 573 NW2d 348 (1997)].
>
> * * *
>
> A duty of care
>
> "may arise specifically by mandate of statute, or it may arise generally by

[2] In addressing foreseeability, *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 15; 596 NW2d 620 (1999) went on to note that "**[t]he mere fact that an event may be foreseeable is insufficient to impose a duty upon the defendant**"; rather, the question is whether, in light of all the relevant evidence, "the defendant is under any obligation for the benefit of the particular plaintiff...." (internal citations omitted; emphasis added). Thus, while Starr continues to argue for the reasons set forth through this case that Wade's murder at the hands of Kirksey's was simply not foreseeable, Plainitff-Appellee's reliance on the alleged foreseeability of Kirksey's actions are simply misplaced, as that foreseeability still would not establish a duty of care.

> operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his action as not to unreasonably endanger the person or property of others." [*Clark v Dalman,* 379 Mich 251, 261; 150 NW2d 755 (1967)].
>
> * * *
>
> However, **the fact that defendant's conduct may have been in violation of a statute does not in and of itself shed light on whether defendant owed plaintiff a duty of care; however, once a duty is found, the violation of a statute can be prima facie evidence of negligence**. Rather, whether a plaintiff can use a statute to impose a duty of care on a defendant depends on (1) whether "the purpose of the [statute] was to prevent the type of injury and harm actually suffered" and (2) whether the plaintiff was "within the class of persons which [the statute] was designed to protect."

Cipri, supra 14-16 (some internal citations omitted; emphasis added).

Thus, while Plaintiff contends that Starr's reliance on the common-law duty test was improper, *Cipri* makes clear that it is necessary to rely on that duty test in order to answer the threshold question of whether the statute violated imposed a duty as a matter of law. *Id.* Just as in *Cipri*, Starr has consistently addressed whether the statute at issue in this case, §306a, was codified to "'prevent the type of injury and harm actually suffered' and [] whether [Wade] was 'within the class of person which [§306a] was designed to protect,'" and argued why §306a was not designed to protect Wade in general nor was it designed to protect Wade from the particular injury suffered (Starr's Brief On Appeal, pp 17-32; Starr's Court of Appeals Brief, pp 13-14; Starr's Motion for Reconsideration, pp 5-6). Accordingly, while Plaintiff claims that Starr has impermissibly "merge[d] consideration of a duty to the 'general public' with what it describes as the 'statutory purpose doctrine," (Plaintiff's Brief, p 15), Starr respectfully argues that it is impossible to determine whether a particular statute imposes a duty on the general public without considering the purpose of the statute.

To this end, Starr has addressed three out of state cases in which the courts had to decide whether a violation of either an administrative rule or statute constituted negligence per se, and

in both instances the courts determined that there was no duty owed to the general public to protect them against the harm alleged. *See Katsares v Open Line Group Homes, Inc*, 2004 Cal App Unpub LEXIS 6236 (decided June 30, 2004) (Appellant's Appendix, 88a-91a), *McAlpine v Multnomah County*, 131 Ore App 136; 883 P2d 869 (1994),[3] and *Doyle v United States*, 530 F Supp 1278 (1982). Indeed, *Doyle*'s discussion of *Graham v State, Health & Social, Etc*, 354 So 2d 602 (La App 1st Cir 1977) is particularly insightful in that there the court found no duty in a case where the injury was to a complete stranger located 100 miles away from the mental hospital where the mental patient escaped from, noting that any other holding would result in **"unqualified liability . . . for any harm caused by an escaped inmate under any and all circumstances, irrespective of intervening time and distance**." *Doyle*, *supra* at 1287, *quoting Graham*, *supra* at 606. Tellingly, Plaintiff has failed to address any of these cases. Presumably this is because Plaintiff realizes the substantial similarity between the issues faced by the state and federal courts in those cases, and could not find any logically honest way to distinguish them from the instant case.

B. Plaintiff's Discussion of the Public Duty Doctrine Is Inapplicable.

Plaintiff addresses this Court's decision in *Beudrie v Henderson*, 465 Mich 124; 631 NW2d 308 (2001) wherein this Court addressed the public-duty doctrine and the appropriate limits of that doctrine (Plaintiff's Brief, pp 16-18). The discussion of the public-duty doctrine in this case is wholly misplaced as Starr is not a public entity. However, *Beudrie* is helpful to Starr in one particular manner: the case reiterated that when determining tort liability, that liability

[3] These cases are addressed in detail in Appellant's Brief On Appeal, pp 26-28. In addition to these out of state cases, Plaintiff has also failed to address *Graves v Warner Bros*, 253 Mich App 486, 497-98 (2002), a case relied on heavily by the trial court and Starr (Appellant's Appendix, 16a-17a; Appellant's Brief On Appeal, pp 7, 23, 25, 36, 36), where the Court of Appeals affirmed the "long-established rule that there is no general duty to anticipate and prevent criminal activity . . . .Any duty is limited to . . . situations that occur on the premises and pose a rise of imminent and foreseeable harm to **identifiable invitees**").

"should be determined using traditional tort principles," including the issue of whether the particular defendant being sued owed an individualized duty to the particular plaintiff that has brought the negligence action. *Id.* at 134, 138. This is precisely what Starr has argued throughout this case – that the traditional tort principles of duty and proximate cause must be considered in order determine whether the legislature intended to create tort liability to the general public as a result of a violation (or alleged violation of) §306a(1).

C. Plaintiff Attempts to Insert Words and Intent into MCL 803.306a.

In an effort to establish that Wade was within the protected class of individuals §306a(1) was designed to protect, and that the statute's immediate notification requirement was designed to protect against a murder occurring 100 miles away and eleven days following an escape, Plaintiff argues – without any legislative or other authority – that "it should require only a modicum of 'common sense' to determine why §306a(1) was passed and who that statute was designed to protect," and states that common sense dictates that the "immediate notification requirement . . . was passed to ensure the *immediate* apprehension of potentially dangerous individuals" (Plaintiff's Brief, p 19). The problem with this argument is that §306a(1) is not limited to solely notifying law enforcement of the escape of potentially dangerous individuals. Rather, the statute requires the immediate notification of law enforcement whenever there is an escape regardless of any potential danger to the public as a result of the escape.[4]

In the same vein, Plaintiff's partial quotation from the preamble of the Youth Rehabilitation Services Act, MCL 803.301 in no way supports Plaintiff's *non sequitur* "that §306a(1)'s requirement of immediate notification is designed to achieve the speedy apprehension

[4] In response to Plaintiff's question as to who §306a was "meant to protect," the answer is simple: it was designed not to protect anyone, but rather to ensure that a felony is reported to law enforcement "as quickly as possible" (Appellant's Appendix, 30a). Nothing in either the House or Senate analyses of the bill provide for any other answer (*Id.* at 29a – 32a).

of juveniles who pose a danger after escaping from a detention facility." Simply put, the preamble of the Act, which Plaintiff concedes "is useful for interpreting its purpose and scope," (Plaintiff's Brief, p 18 n 11, *citing Malcolm v City of Detroit*, 437 Mich 132, 143; 468 NW2d 479 (1991) and *King v Ford Credit Co*, 257 Mich App 303, 311-312; 668 NW2d 357), provides no discussion of protecting the public from potential dangers at the hands of an unidentifiable escapee that may or may not be dangerous. See MCL 803.301; Appellant's Brief On Appeal, p 18). Indeed, the preamble does not even state that one of the purposes of the Act was "to achieve the speedy apprehension of juveniles," stating simply that the Act was codified "to prescribe procedures for the return of state wards who absent themselves without permission."[5] *Id.*

Similarly, Plaintiff reads words into the immediate notification requirement, arguing that "[w]hen [Starr's] agents learned of [Kirksey's escape] the notification requirement of §306a(1) took effect" (Plaintiff's Brief, p 24). However, Plaintiff's interpretation inserts words that are not present. Section 306a(1)(b)(i) states, in relevant part that "[i]f a public ward . . . escapes from a facility or residence[6]. . ., the individual . . . responsible for maintaining custody of the public ward **at the time of the escape shall immediately notify**" law enforcement. Plaintiff wishes the statute required that "the individual . . . shall immediately ***upon discovery or knowledge of the escape*** notify" law enforcement. Unfortunately for Plaintiff, the words "discovery" or "knowledge" are not contained within §306a(1)(b)(i).

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[5] Plaintiff argues that Starr's argument regarding the fact that it did not violate the immediate notification requirement of §306a(1) by rejecting the common lay definition of the term "facility," and focusing instead on the definition of the word "escape" (Plaintiff's Brief, p 23). The definition of "escape" contained within the §306a(4) in no way contradicts or undermines what a "facility" is when determining whether an escape occurred.

[6] The insertion of both the term "facility" and "residence" in the statute further undermines Plaintiff's argument that Kirksey "escaped" when he left his room. If that was the intent of the legislature, it easily could have inserted the word "room" or other similar term to make the notification requirement more strict than drafted.

In essence, Plaintiff requests that this Court "improperly add[] to the statute [additional] words" that are not required. "The only basis for adding [the requested] language is the simple desire to make the statute so read." *Stone v Williamson*, 482 Mich 144, 160 n 9; 753 NW2d 106 (2008). Courts shall refrain from adding or subtracting words into statutes. *Lesner v Liquid Disposal, Inc,* 466 Mich 95, 101; 643 NW2d 553 (2002). "The better judicial practice is to refrain from adding requirements to a statute that are not contained within its language." *Potter v McLeary*, 484 Mich 397, 423; 774 NW2d 1 (2009). This is especially true when the statute can be interpreted in a logical, coherent fashion by using the plain and ordinary dictionary definition of the term "immediately," a term not defined in the statute. Thus, while Starr suggests that some substantial compliance of the statute may be necessary, that substantial compliance should comport with the plain and ordinary usage of the undefined terms contained in the statute and the legislature's intent, not include the addition of additional words the Legislature did not include.[7]

D. The Duty Question Is Properly Decided By The Court.

Plaintiff next argues that the issue of whether §306a(1) was violated is "properly a factual

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[7] Plaintiff suggests Starr abandoned or waived its arguments regarding whether it violated the immediate notification requirement of §306a(1) (Plaintiff's Brief, p 22). Notwithstanding this Court's explicit instruction to brief the issue of "whether, under the facts of this case, defendant Starr Commonwealth's alleged failure to 'immediately' notify, within the meaning of MCL 803.306a(1) . . . constituted negligence per se," which Starr contends requires a discussion of whether the statute was indeed violated by Starr, Starr notes that it has consistently argued that, as written, it is impossible to comply with the immediacy required as written.

Starr noted in its Motion for Reconsideration (p 3 n 3) that "it is clear that the statute must provide for a 'substantial compliance' component regarding the timing of the contact, as it is impossible for public ward facilities to contact law enforcement agencies immediately upon the escape of an individual as the statute is written." At the Court of Appeals, Starr argued that the statute could not be complied with as written except in extremely rare cases where an employee of the agency was present while the escape occurred and had with them a mobile phone that would permit the individual to immediately contact law enforcement (instead of actually trying to prevent the escape) (Court of Appeals' Brief, p 12 n 10). Finally, Starr addressed this issue when seeking leave to appeal before this Court (Leave App, p 15 n 8).

By contrast, Plaintiff did "not challenge[] the duty based ruling of the trial court's decisions" (Murray, J., *dissenting*, p 2; Appellant's Appendix, p 27a).

question for the jury to resolve" (Plaintiff's Brief, p 22, *citing Zeni v Anderson*, 397 Mich 117, 135; 243 NW2d 270 (1986) (other citations omitted)). However, as *Wilson v State Farm Ins Co*, 437 Mich 205, 214 n 11; 468 NW2d 511 (1991) held, "a court may in effect excuse an individual from the consequence of violating a statute." *See also Klanseck v Anderson Sales & Services, Inc*, 426 Mich 78, 87; 393 NW2d 356 (1986) ("the use of the statutory violation to establish negligence is a matter of judicial discretion").[8] Thus, such a holding would significantly change this state's negligence law, which has always noted that the duty issue is a question of law, and that the proximate cause issue can be a question of law. *Valcaniant, supra* at 86; *Moning v Alfono*, 400 Mich 425, 440; 254 NW2d 759 (1977).

E. Plaintiff Failed To Establish A Genuine Issue With Regard Proximate Cause.

Finally, Plaintiff's attempts to create a factual issue on proximate cause fail.[9] In this regard, Plaintiff has attempted to argue that due to Kirksey's past behavior, it was foreseeable to believe that if he escaped from Starr, he would murder a complete stranger, and that therefore Starr's "negligence" was the proximate cause of this intervening criminal act (Plaintiff's Brief, pp 26-36), and argues that Michigan courts have rejected the argument that "mere lapse of time between defendant's negligence and plaintiff's resultant injuries will serve to transform that which otherwise would be a proximate cause into a remote cause excusing defendant from liability" (Plaintiff's Brief, p 36). Plaintiff primarily relies on *Parks v Starks*, 342 Mich 443; 70

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[8] *Cipri* also establishes that the jury need not determine the issue of whether negligence existed under the statute if there was no duty of care. *Id.* at 14-18.

[9] Plaintiff incorrectly asserts that Starr did not address the foreseeability of Kirksey's criminal actions and did not address the remoteness associated with the crime (Starr's Mot. for Summ. Dis., p 4; Starr's Mot. for Reconsideration, p 9). The same is true with regard to Plaintiff's assertion that Starr did not previously argue cause-in-fact, which is clearly part of the proximate cause analysis. *See Weymers v Khera*, 454 Mich 639, 647-48; 563 NW2d 647 (1997), *citing Skinner v Square D Co*, 445 Mich 153, 162-63; 516 NW2d 475 (1995) (Mot for Reconsideration, p 9, *citing Davis v Wisconsin Logistics, Inc*, unpublished opinion per curiam of the Court of Appeals, Docket No. 264002, iss'd 2/23/06). In any event, we note that this Court specifically requested briefing regarding the proximate cause issue (Appellant's Appendix, 28a).

NW2d 805 (1955) for this proposition.[10] *Parks* is clearly distinguishable. First, *Parks* dealt with a delay of nine hours, not eleven days. *Id.* at 446. Second, *Parks* dealt with an issue of "an independent, subsequent act of negligence," as opposed to an independent, intervening, criminal act. *Id.* Third, in *Parks* "the prior act of negligence [was] still operating" when the subsequent intervening negligent act occurred, and that the injury suffered was "not different in kind from that which would have resulted from the prior act." *Id.* at 447. Here, any assumed "negligence" ended when it did contact the police immediately after searching for him on the premises.[11]

3. Conclusion.

Wherefore, Starr respectfully requests that this Court reverse the Court of Appeals, and dismiss Plaintiff's case in its entirety.

Respectfully submitted:

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[10] Plaintiff's reliance on *Hickey v Zezulka*, 439 Mich 408, 437-438; 488 NW2d 106 (1992), a jail suicide case, is equally unpersuasive, as there the jail clearly had a duty to the prisoner while the prisoner was in the jail's custody.

[11] Plaintiff's proposition that "[t]his Court should . . . conclude that the . . . adoption of MCL 600.2956, MCL 600.2957, and MCL 600.6304 eliminates further reliance on the common law doctrine of superseding cause," (Plaintiff's Brief, p 27), would radically change common law in this state, and this Court has not requested briefing on the topic. Nonetheless, Starr notes that these statutes were passed in order to assign fault after a finding of negligence. Proximate cause and causation are elements that must be present and established in order to have a prima facie negligence claim. The allocation of fault statutes addressed by Plaintiff in no way eliminates these elements of a prima facie case.